No. 91-2042

In the Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT P. FAGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether convicting petitioner under Article 125 of the Uniform Code of Military Justice, 10 U.S.C. 925, for engaging in sodomy with a 16-year-old girl to whom he was not married, violated his constitutional right to privacy.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-4a, is reported at 34 M.J. 179. The opinion of the Air Force Court of Military Review, Pet. App. 5a-12a, is reported at 33 M.J. 618. The opinion of the court of military review on remand is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 24, 1992. The petition for a writ of certiorari was filed on June 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Altus Air Force Base in Oklahoma, petitioner, a member of the United States Air Force, was convicted on one count of carnal knowledge and one count of sodomy, in violation of Articles 120(b) and 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920(b) and 925. He was sentenced to seven months' confinement, a bad conduct discharge, and a reduction in rank to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review initially set aside petitioner's conviction for sodomy, affirmed the conviction for carnal knowledge, and approved the portion of the sentence that extended to confinement and reduction in rank. The Judge Advocate General of the Air Force certified the case for review by the Court of Military Appeals with regard to the dismissal of petitioner's sodomy conviction. The Court of Military Appeals reversed the decision dismissing the sodomy charge, reinstated the original findings and sentence, and remanded the case to the court of military review. On remand, the court of military review affirmed the original findings and sentence.

1. At trial, petitioner pleaded guilty to the two offenses of which he stands convicted, entered into a stipulation of fact with the prosecution, and participated in an inquiry with the trial judge to insure that his pleas were provident. Tr. 12-25. By his own account, petitioner was involved with several young girls in and around Altus, Oklahoma. Petitioner's partner in sodomy was a 16-year-old who reported him to police after he left her for another 16-year-old and then for a 14-year-old junior high school student, who was his victim in the carnal knowledge offense. Pet. App. 3a.

2. In the court of military review, petitioner argued that Article 125, UCMJ, 10 U.S.C. 925, was unconstitutional as applied to his heterosexual, noncommercial, private acts of sodomy with a consenting 16-year-old. Pet. App. 6a. A panel of the court of military review agreed by a divided vote, recognizing, for the first time by any military appellate court, a constitutional zone of privacy for such activity. Pet. App. 5a.

3. The Court of Military Appeals reversed the decision of the court of military review, relying on its decision in a companion case decided the same day, *United States* v. *Henderson*, 34 M.J. 174 (C.M.A. 1992). Pet. App. 1a-2a. *Henderson* acknowledged that this Court has accorded constitutional protection to a number of interests in the name of privacy. 34 M.J. at 176. Nonetheless, *Henderson* followed the reasoning of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in upholding Article 125, UCMJ, 10 U.S.C. 925. 34 M.J. at 177.

ARGUMENT

1. Petitioner contends that his sodomy conviction violates his constitutional right to privacy. Petitioner bases his argument on decisions of this Court such as *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), *Stanley* v. *Georgia*, 394 U.S. 557 (1969), *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977). His claim does not warrant review by this Court. [1]

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[1] The Court of Military Appeals noted that "[i]n reality, it would appear that sodomy had little bearing on sentence." Pet. App. 3a. That observation is correct. Petitioner did not in the military courts, and does not in this Court, contest his conviction for the more serious offense of carnal knowledge committed with a 14-year-old, which carries a maximum punishment that includes 15 years' imprisonment and a dishonorable discharge. *Ibid.* He was sentenced to seven months' confinement,

a. Petitioner overlooks the fact that he was an adult, PX 5, but his 16-year-old partner was a minor, see Okla. Stat. Ann. tit. 10, § 1101(1) (West 1987 & Supp. 1992); Okla. Stat. Ann. tit. 15, § 13 (West 1983) ("Minors, except as otherwise defined by law, are persons under eighteen (18) years of age."). That fact is highly significant. It is universally accepted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). As Justice Brennan has noted, "the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford* v. *Kentucky*, 492 U.S. 361, 395 (1989) (dissenting opinion). See also, *e.g.*, *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

Society has long attempted to protect minors from the adverse consequences of their immaturity by means such as laws prohibiting adults from contributing to the delinquency of a minor, Okla. Stat. Ann. tit. 21, §§ 856, 857.2 (West 1983 & Supp. 1992), or prohibiting the use of children in sexual activity, 18 U.S.C. 2251-2252, 2256. This Court has also upheld such laws over constitutional challenges. See

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a bad conduct discharge, and a reduction in rank to the lowest enlisted grade. When the court of military review originally reversed petitioner's sodomy conviction, the court left in place the seven-month term of imprisonment and the reduction in rank; the court found inappropriate only the bad conduct discharge. See Pet. App. 10a-11a.

Osborne v. *Ohio*, 495 U.S. 103 (1990); *New York* v. *Ferber*, 458 U.S. 747 (1982) (both upholding child pornography statutes); *Ginsberg* v. *New York*, *supra* (upholding statute prohibiting distribution of pornography to minors).

None of this Court's decisions is to the contrary. The privacy right recognized in *Griswold* was clearly grounded in the status of the institution of marriage.[2] Petitioner and his schoolgirl partner were not married, so *Griswold* does not aid him. *Eisenstadt* held invalid under the Equal Protection Clause a state law barring the distribution of contraceptives to unmarried adults, but it did not address the issue of state regulation of conduct toward minors. 405 U.S. at 443, 453-455. This Court in *Carey* held unconstitutional a state law prohibiting the distribution of contraceptives to minors, but that ruling does not assist petitioner. A four-Justice plurality believed that the state law implicated a minor's interest in avoiding an unwanted child. 431 U.S. at 691-699. Justice White was the fifth vote to invalidate the statute, and he concurred only in the result, on the ground that the statute did not "measurably contribute[] to the deterrent purposes which the State advances as justification for the restriction."

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[2] *Griswold* identified the petitioners as persons who "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception." 381 U.S. at 480. The Court asked, "Would we allow the police to search the sacred precincts of *marital* bedrooms for telltale signs of the use of contraceptives?," and answered: "The very idea is repulsive to the notions of privacy surrounding the *marriage* relationship." *Id.* at 485-486 (emphasis added). *Griswold* concluded: "*Marriage* is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. * * * [I]t is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486 (emphasis added).

Id. at 702. In fact, five Members of the Court either dissented from the plurality's conclusion or went so far as to label "frivolous" the claim that "a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." *Id.* at 703 (opinion of White, J.); *id.* at 702 (Burger, C.J., dissenting); *id.* at 703-710 (opinion of Powell, J.); *id.* at 713 (opinion of Stevens, J.); *id.* at 717-719 (Rehnquist, J., dissenting).

b. Amicus Navy-Marine Corps Appellate Defense Division claims that the ruling below conflicts with various lower court decisions holding unconstitutional state sodomy laws as applied to the private consensual heterosexual acts of unmarried adults. Navy-Marine Corps Amicus Br. 2-3 & n.3. Each lower court decision holding such a state law invalid under those circumstances, however, made clear that its ruling was limited to conduct between adults. In addition, several of the decisions explicitly acknowledged that the State has the power to outlaw sexual conduct between an adult and a minor.[3] Accordingly, there is no conflict among the lower courts on the question presented by this case.

2. Petitioner argues that he lacked notice that he could be court-martialed for his conduct, and that

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[3] See *State* v. *Pilcher*, 242 N.W.2d 348, 356, 359, 360 (Iowa 1976); *Commonwealth* v. *Balthazar*, 318 N.E.2d 478, 481 & n.3 (Mass. 1974); *People* v. *Onofre*, 415 N.E.2d 936, 940-941 (N.Y. 1980) (noting the absence of "the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice"), cert. denied, 451 U.S. 987 (1981); *Commonwealth* v. *Bonadio*, 415 A.2d 47, 49 (Pa. 1980) (noting that "[t]he state clearly has a proper role to perform * * * in protecting minors from being sexually used by adults"); *State* v. *Saunders*, 381 A.2d 333, 340 & n.6 (N.J. 1977).

prosecuting him for the conduct at issue here violated the equal protection component of the Due Process Clause. Pet. 10-13. Petitioner, however, has not properly preserved those claims. Petitioner did not raise those claims at trial when he pleaded guilty, nor did he assert them in either military appellate court. Accordingly, he cannot raise those claims for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's claims lack merit.

Petitioner relies on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Marks* v. *United States*, 430 U.S. 188 (1977), see Pet. 10-11, but neither decision aids him. *Bouie* and *Marks* forbid the retroactive application of an unforeseeable judicial expansion of the substantive scope of a criminal statute to reach conduct that a person could not reasonably have believed was criminal at the time he committed it. See *Rose* v. *Locke*, 423 U.S. 48, 53 (1975); *Splawn* v. *California*, 431 U.S. 595, 601 (1977) (*Bouie* held "that the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited").[4] No "fair

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[4] *Bouie* held that due process barred the conviction of two black college students for their refusal to leave an "all-white" lunch counter, where the "narrow and precise," 378 U.S. at 352, state criminal trespass statute under which they were convicted on its face prohibited only the entry onto the property of another in violation of previously given notice, *id.* at 349 n.1, and where, prior to the conduct at issue, that statute never had been construed to cover the refusal to leave the property of another, *id.* at 350. *Marks* held that the new standard for determining the constitutionality of obscene materials that was adopted in *Miller* v. *California*, 413 U.S. 15 (1973),

warning" concern is present in this case, because petitioner had adequate notice that he could be prosecuted for the actions at issue here.

Article 125 of the UCMJ, 10 U.S.C. 925, prohibits sodomy, which is defined in part as the "unnatural carnal copulation with another person of the same or opposite sex." In *United States* v. *Scoby*, 5 M.J. 160, 164-166 (1978), the Court of Military Appeals indicated that a servicemember could be prosecuted under Article 125, UCMJ, 10 U.S.C. 925, for sodomy committed in either a public or private location, and this Court in *Rose* v. *Locke* upheld a state law treating sodomy as a form of "unnatural copulation," 423 U.S. at 52 (quoting *Sherrill* v. *State*, 321 S.W.2d 811, 812 (Tenn. 1959), quoting from *State* v. *Cyr*, 198 A. 743 (Me. 1938)). See also *United States* v. *Henderson*, 34 M.J. at 176 ("oral copulation has been openly and expressly prohibited in the armed forces of the United States since time immemorial"); cf. *Wainwright* v. *Stone*, 414 U.S. 21 (1973) (upholding state sodomy law over vagueness challenge). Petitioner therefore had adequate notice that his conduct could be punished under the UCMJ.

Petitioner maintains that the government violated equal protection principles by prosecuting him under the UCMJ knowing that he could not be prosecuted in the Oklahoma state courts for the conduct in question. That claim also lacks merit, for several reasons. To begin with, petitioner's argument rests on a false premise. The state decisions he cites to support his claim that he could not be prosecuted in the Oklahoma courts, *Hinkle* v. *State*, 771 P.2d 232 (Okla. Crim. App. 1989), and *Post* v. *State*, 715 P.2d 1105 (Okla. Crim.

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could not be retroactively applied to conduct that occurred prior to the decision in *Miller*. 430 U.S. at 196-197.

App. 1986), cert. denied, 479 U.S. 890 (1986), involved conduct between adults, not between an adult and a minor, which was the case here.

In addition, there is no unfairness in prosecuting a person under the UCMJ for conduct that is not a crime under state law. It is not uncommon for federal law to outlaw conduct that is not a crime under state law, or even under federal law applicable only to civilians. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733 (1974) (upholding the constitutionality of Arts. 133 and 134, UCMJ, 10 U.S.C. 933 and 934, which outlaw "conduct unbecoming an officer and a gentleman" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces"). Congress could reasonably believe that it is valuable to have a uniform code of conduct governing the actions of servicemembers, rather than rely on the different laws of the various States.

Finally, insofar as petitioner suggests that he was unfairly prosecuted, he has not alleged or proved that he was singled out on the basis of an invidious characteristic, such as race or religion, as settled equal protection principles require. See, *e.g.*, *McCleskey* v. *Kemp*, 481 U.S. 279, 292 (1987); *Wayte* v. *United States*, 470 U.S. 598 (1985). At bottom, petitioner's equal protection claim is not materially different from his privacy claim, and also warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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